LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 2 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 155

HUGHES TOOL COMPANY,

Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

JOHN F. SONNETT,
80 Pine Street,
New York, New York 10005,
Attorney for Respondent,
Trans World Airlines, Inc.

CARL S. ROWE,
25 Broadway,
New York, New York 10004
Attorney for Respondent,
Trans World Airlines, Inc.

Of Counsel:

DUDLEY B. TENNEY,
MARSHALL H. COX, JR.,
ABRAHAM P. ORDOVER,
80 Pine Street,
New York, New York 10005.

July 2, 1965.

INDEX

	PAGE
QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
Prior Board Proceedings	3
TWA's Antitrust Case	6
Toolco's Reacquisition Motion	7
The Board's Order	11
The Court of Appeals Decision	13
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	14
A. Toolco's Purchase of the Series A Notes Would be an Acquisition of Control	16
B. The Board's Order Violated the Hearing Requirements of Section 408(b)	21
C. The Narrow Issue Tendered by the Petition Does Not Warrant Review by This Court	24
(1) *The Board's Legal Theory*	25
(2) *Toolco's Arguments*	28
(3) *TWA's Standing to Sue*	31
CONCLUSION	32

TABLE OF AUTHORITIES

Cases:

Alleghany Corp. v. *Breswick & Co.*, 353 U. S. 151 (1957)	18, 19
Burlington Truck Lines v. *United States*, 371 U. S. 156 (1962)	24
California v. *Federal Power Commission*, 369 U. S. 482 (1962)	24n
Morgan v. *United States*, 298 U. S. 468 (1936)	23n
Morgan v. *United States*, 304 U. S. 1 (1938)	23n

PAGE

North Atlantic Route Transfer Case, 11 C.A.B. 676 (1950) 17

Pan American Airways, Inc., Acquisition of Aeronaves de Mexico, 4 C.A.B. 494 (1943) 17

Pan American Airways, Inc., Acquisition of Aerovias de Guatemala, 4 C.A.B. 403 (1943) 17

Pan American—Panagra Agreement, 8 C.A.B. 50 (1947) 17

Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943) 17

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 (1939) 17, 19

Social Security Board v. *Nierotko*, 327 U. S. 358 (1946) 25

Toolco-Northeast Control Case, CAB Order No. E-18470 (1962), *aff'd sub nom., National Airlines, Inc.* v. *Civil Aeronautics Board*, 321 F. 2d 380 (D.C. Cir. 1963) 9, 10n, 11, 12, 12n

Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) 4, 8n

Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company, 9 C.A.B. 381 (1948) 4, 17, 27

Transocean-Atlas Case, Control and Interlocking Relationships, 29 C.A.B. 622 (1959) 27n

Trans World Airlines, Inc. v. *Hughes, et al.*, S.D.N.Y. Dkt. No. 61 Civ. 2324, 32 F.R.D. 604 (1963), *aff'd.*, 332 F. 2d 602 (2d Cir. 1964), *cert. dismissed, as improvidently granted, Hughes Tool Company, et al.* v. *Trans World Airlines, Inc.*, No. 443, 380 U. S. 248 (1965), *Hughes Tool Company* v. *Trans World Airlines, Inc., et al.*, No. 501, 380 U. S. 249 (1965) 2, 6, 7, 9, 10n, 11, 26n, 29

Trans World Airlines, Inc. v. *Hughes, et al.*, Civil Action No. 1607, Ch. Ct. Del., Newcastle County 6n

PAGE

Trans World Airlines, Inc., Further Control by Hughes Tool Company, 12 C.A.B. 192 (1950) 4, 8, 9, 17

Civil Aeronautics Board Orders:

Order No. E-16195, Docket 1182 (December 29, 1960) 4, 5, 5n, 8, 26

Order No. E-18470, Docket 11620 (June 19, 1962) 9

Order No. E-10360, Docket Nos. 8061, *et al.* (June 8, 1956) 8n

Order No. E-12604, Docket Nos. 8061, *et al.* (June 4, 1958) 8n

Statutes and Rules:

Administrative Procedure Act of 1946:

§5, 60 Stat. 239, 5 U.S.C. §1004 (1946) 10

§5(d), 60 Stat. 239, 5 U.S.C. §1004(d) (1946) 23n

Federal Aviation Act of 1958:

§408, 72 Stat. 767, as amended, 49 U.S.C. §1378 (Supp. V, 1964) 2, 3, 3n, 4, 10, 11, 12, 16, 20, 26, 27n, 28, 28n, 31

§408(a), 72 Stat. 767, 49 U.S.C. §1378(a) (1958) 3, 15, 16, 16n, 17, 22

§408(b), 72 Stat. 767, as amended, 49 U.S.C. §1378(b) (Supp. V, 1964) 6n, 15, 21, 22, 22n

§1006(a), 72 Stat. 795, 49 U.S.C. §1486(a) (1958) 31

§1006(d), 72 Stat. 795, as amended, 49 U.S.C. §1486(d) (Supp. V, 1964) 15

Rules of the United States Court of Appeals For The Second Circuit:

Rule 25(b) 14

PAGE

Miscellaneous Authorities:

Annual Report of the Civil Aeronautics Board to the Congress of the United States (1963) 9n

Attorney General's Manual on the Administrative Procedure Act (1947) 23n

House and Senate Reports:

H.R. Rep. No. 2171, 86th Cong., 2d Sess. (1960) 22n

S. Rep. No. 1344, 86th Cong., 2d Sess. (1960) 22n

IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 155

HUGHES TOOL COMPANY,

Petitioner,

against

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

Question Presented

The case involves a single question:

Was the Civil Aeronautics Board (the "Board") required to hold a hearing, as Trans World Airlines, Inc. ("TWA") requested, before permitting Hughes Tool Company—a company the Board knew to be then engaged in the terminal stages of bitter litigaton with TWA—to reacquire voting control of TWA by purchasing certain TWA securities from their present holders?

What the petitioner (intervenor below), Hughes Tool Company ("Toolco"), asks this Court to review is a narrow determination by the United States Court of Appeals for the Second Circuit that the respondent TWA is entitled to a hearing before Toolco can acquire control of it, both (a) because Section 408 of the Federal Aviation Act (the "Act") expressly requires a hearing when a person engaged, as Toolco is, in another phase of aeronautics acquires control of an airline, and (b) because in any event —in the unique circumstances of this case—the Board's denial of the hearing which TWA requested amounted to an abuse of discretion.

All the Court of Appeals held was that such a hearing was required. It did not reach, and had no occasion to reach, the substantive question of whether or not Toolco should be allowed to control TWA.

The Board itself has not petitioned for review.

Counterstatement of the Case

This case is another incident in the basic controversy between TWA and Toolco, the central facts of which were presented to this Court last Term in *Hughes Tool Company, et al.* v. *Trans World Airlines, Inc.*, No. 443, and *Hughes Tool Company* v. *Trans World Airlines, Inc., et al.*, No. 501. Certiorari was dismissed in each of those cases as improvidently granted, 380 U. S. 248 and 380 U. S. 249. The exhaustive briefing there and the Court's resultant knowledge of the record facts in the larger controversy permit a summary statement here.

The petition arises out of a last gasp effort by Toolco to assume control of TWA through summary, non-hearing proceedings before the Board and thereafter to substitute

for a judicial determination of TWA's antitrust claims against it whatever other resolution Toolco might see fit to dictate.

The decision below blocked this attempt by setting aside and remanding Board Order No. E-21057 entered July 10, 1964 in *The Matter of the Application of Hughes Tool Company for Approval under Section 408 of the Federal Aviation Act of 1958, as amended, of the Acquisition of Control of Trans World Airlines, Inc.*, CAB Docket No. 1182 [A-202*].

Prior Board Proceedings

Docket No. 1182 was instituted in 1943. Acting pursuant to Section 408 of the Act, the Board in 1944 approved the acquisition of control of TWA by Toolco, which was then and still is a person engaged in an "other phase of aeronautics" within the meaning of the Act.** *Trans-*

---

*References with the prefix "A-" are to pages of the Appendix to Brief for TWA filed with the Court of Appeals, ten copies of which have been filed with the Clerk of this Court; references with the prefix "R." are to pages of the record in the Court of Appeals as certified by the Clerk of that Court.

** Section 408 provides in pertinent part:

"(a) It shall be unlawful unless approved by order of the Board as provided in this section—

* * * * *

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; * * *."

TWA is of course a major American-flag domestic and international air carrier operating under certificates of public convenience and necessity granted by the Board. Toolco is a vast industrial organization which includes among its many interests the development and manufacture of aircraft and related activities including the sale and leasing of aircraft; Toolco also presently controls Northeast Airlines, Inc. ("Northeast"), an air carrier, but it has announced an intention to divest itself of that control and TWA has neither the right nor any desire to object to such divestiture. The issue presented to the Court of Appeals was whether, *assuming such divestiture*, TWA was entitled to a hearing before Toolco could acquire control of it.

continental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944) [A-88]. Toolco had begun purchasing TWA's stock in 1939 and at the time of the hearing owned 46% of it.

In a later proceeding the Board found that Toolco's acquisition of more TWA stock (which increased its ownership to 73% of that outstanding) amounted to a further acquisition of control requiring Board approval under Section 408. *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company*, 9 C.A.B. 381 (1948) [A-99]. Such approval was granted after a hearing. *Trans World Airlines, Inc., Further Control by Hughes Tool Company*, 12 C.A.B. 192 (1950) [A-187]. Beginning in 1947, Toolco nominated all TWA directors and controlled, dominated and determined in all respects the management of the airline. Toolco's ownership of TWA's stock eventually rose to 78% of that outstanding. The balance is widely held, presently by an estimated 13,000 public stockholders.

In December 1960, as a condition to a series of transactions comprising a comprehensive plan to finance TWA's jet equipment program, Toolco deposited all its TWA stock in a Voting Trust with three trustees. As part of the financing plan, two lending institutions (Metropolitan Life Insurance Company and The Equitable Life Assurance Society of the United States) purchased "Series A Sinking Fund Notes" from TWA, in the principal amount of $92,800,000 (the "Series A Notes"), and they continue to hold all such notes outstanding. Two of the three Voting Trustees are now appointed by these holders of the Series A Notes and the third by Toolco. As a result of these transactions, which were considered by the Board in Order No. E-16195, dated December 29, 1960 [A-191],

plenary power to control TWA as stockholders passed to the Voting Trustees.*

Under the 1960 transaction Toolco was given an option to purchase the Series A Notes from the holders thereof, on certain terms. Exercise of that option would give Toolco the power to name all three Voting Trustees or to terminate the Voting Trust, as it chose. However, in referring to the possibility of Toolco's regaining control of TWA, the Board said in its December 1960 order:

> "* * * the Board wishes to make clear the fact that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA. It is clear that such approval would not be forthcoming without a searching inquiry into

---

* The Board in that order summarized the significance of the change in control as follows:

> "Upon the Board's grant of the requested modification of the limitations of Order 3210, and the consummation of the refinancing plan, a significant and fundamental change will have been accomplished in the control of TWA by Toolco. Upon the execution of the Voting Trust, the Toolco control of TWA will change drastically in both form and substance. No longer will the directors of Toolco be free to enforce their dictates or those of Toolco's controlling shareholder on TWA. Only one of the three voting trustees will represent directly these interests. Two of the voting trustees, selected by the financial institutions, will be independent of Toolco and of Mr. Hughes.
>
> "The voting trustees will not be restricted in their power to approve further financing for TWA, nor in their ability to sell, lease, transfer, hypothecate or otherwise dispose of, or manage TWA's assets. In short, their power to control TWA is as plenary as that of Toolco and its controlling shareholder" [A-195-96].

the public interest factors affecting this control." (Footnotes omitted.) [A-198]*

TWA's Antitrust Case

Creation of the Voting Trust and the election by the voting trustees of an independent board of directors gave TWA—for the first time since Toolco began acquiring its stock in 1939—a management wholly independent of Toolco. One of the early acts of this management was to retain independent counsel to investigate whether TWA had legally enforceable claims against any other persons or corporations. On June 30, 1961, upon the recommendation of such counsel, TWA brought suit in the United States District Court for the Southern District of New York against Toolco, Toolco's 100% stockholder and controlling person Howard R. Hughes ("Hughes"), and a Toolco executive, Raymond M. Holliday. *Trans World Airlines, Inc.* v. *Hughes,* S.D.N.Y., Docket No. 61 Civ. 2324 (the "antitrust case"). In that action TWA sought damages and equitable relief, including divestiture of the TWA stock owned by Toolco, for injuries it suffered as a result of Toolco's violations of the antitrust laws and other wrongful conduct.**

---

* Toolco argues that the court below misconstrues this order in stating that the Board anticipated a Section 408(b) application and hearing before Toolco would attempt to reassume control over TWA (Petition, p. 6n). The Board's decision was not misconstrued. Under Section 408(b) of the Act, except when control is not affected, a hearing is mandatory on any application filed under Section 408—and the Board expressly stated that such an application should be filed. Moreover, the Board's statement that its approval would not be forthcoming without "a searching inquiry into the public interest factors affecting this control", leaves no doubt that the Board contemplated a hearing which would be intensive as well as extensive.

** On April 18, 1962, TWA brought a second action against Toolco and Hughes in the Chancery Court of the State of Delaware, Newcastle County (Civil Action No. 1607), seeking damages and equitable relief for, *inter alia,* injuries suffered by TWA resulting from the breach by the defendants of their fiduciary duties in the exercise of control over TWA. That action also is still pending.

As this Court is aware from its consideration last Term of the record in No. 443 and No. 501, Toolco defaulted in the antitrust case early in 1963, and an order for a default judgment in TWA's favor was entered by the District Court on May 3, 1963; that decision is reported at 32 F.R.D. 604. In an interlocutory appeal, the Court of Appeals for the Second Circuit on June 2, 1964 affirmed the District Court's decision that TWA's complaint stated a good cause of action over which the District Court had jurisdiction and that prior orders of the Board were no defense thereto; in a companion appeal decided in the same opinion, that court also affirmed the District Court's dismissal with prejudice of certain counterclaims asserted by Toolco. That case is reported at 332 F. 2d 602. This Court granted Toolco's petitions to review that decision of the Court of Appeals (379 U. S. 912) but on March 8, 1965, after full briefing and argument, dismissed the writs as improvidently granted.

As a result of these proceedings, all matters at issue between TWA and Toolco in the antitrust case now stand concluded against Toolco and in favor of TWA, except determinations of how much Toolco is to pay to TWA in damages and of what equitable relief is to be granted. The damages (alleged to exceed $45,000,000 before statutory trebling) are to be determined after a hearing before a Special Master, the Honorable J. Lee Rankin. Whether Toolco should be divested of its stock in TWA and what equitable relief TWA is entitled to are questions the District Court has reserved for decision.

Toolco's Reacquisition Motion

On April 29, 1964, while its interlocutory appeal in the antitrust case was *sub judice* before the Court of Appeals,

Toolco filed a motion [A-3] before the Board in Docket No. 1182 in which (as elaborated by subsequent pleadings) it stated its desire and intent to exercise its option to acquire the Series A Notes and thereby invest in itself complete control over TWA. Toolco asked the Board either to disclaim jurisdiction over these transactions or to grant such approvals and authorizations as were required.

Thereafter on May 7, 1964 TWA filed its answer to the Toolco motion [A-10]. Toolco filed a "Motion and Reply" dated May 13, 1964 [A-47] and TWA filed a "Motion and Reply" on May 22, 1964 [A-74]. National Airlines, Inc. and Eastern Airlines, Inc. each filed a petition for leave to intervene [A-35, A-28], and an answer to Toolco's motion [A-40, A-31]. Toolco opposed their intervention [A-44]. National also filed a reply [A-82].

At the time Toolco's motion was put before the Board, no adversary hearing inquiring into Toolco's fitness to control TWA had been had since the conclusion of the *Further Control* case in 1950.* The Board did not lack notice, however, that charges of a most serious nature had been made about Toolco's relations with TWA, both while it was in control of the airline and after the Voting Trust went into effect. As early as Order No. E-16195 in December 1960 the Board itself had noted that "it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention" [A-197] and that it "would

* Toolco's motion filed May 10, 1956 seeking Board modification of the original 1944 *Control Order* to permit it to sell up to 25 aircraft of its own manufacture to TWA was abandoned after the Board issued an order instituting investigation into the matter; consequently, no investigation was ever held. CAB Order No. E-10360 (Docket Nos. 8061, *et al.*, June 8, 1956); CAB Order No. E-12604 (Docket Nos. 8061, *et al.*, June 4, 1958).

anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA" [A-198]. Toolco's relations with TWA while in control of it were adverted to in the *Toolco-Northeast Control Case* (to which TWA was not a party), CAB Order No. E-18470, June 19, 1962, *aff'd sub nom., National Airlines, Inc.* v. *Civil Aeronautics Board,* 321 F. 2d 380 (D.C. Cir. 1963), although no evidence was received about the charges nor were any findings made.

Finally, and most important, the Board knew of the charges set out by TWA in the antitrust case,* and that Toolco had made what its counsel called a "business decision" to default in that case rather than to defend against them when the cost of defending was to permit the truth to come out in TWA's discovery proceedings under the Federal Rules.

The Court is, of course, familiar with the charges in TWA's complaint [A-210 *et seq.*] in the antitrust case, which were described in great detail in No. 443 last Term (see, *e.g.*, pages 15-18, 36-38, 123-143 of Brief for Respondent in No. 443). Those charges primarily involve events subsequent to the Board's last *Further Control* hearing in 1950 (12 C.A.B. 192 [A-187]) the most important of which occurred from 1955 on when the commercial air carrier industry entered the era of jet transport. It is clear, moreover, that the allegations of the complaint go immediately to the fitness of Toolco to acquire control of an air carrier, since they allege that hereto-

* The Board summarized the complaint in its Annual Report to Congress for 1963, at pages 59-60, as alleging that "* * * the defendants, while in control of an air carrier, had illegally exercised such control to their own benefit and advantage in the area of the financing, purchasing, and the obtaining of equipment by the air carrier."

fore Toolco has abused such control to advance its own interests in the other phases of aeronautics in which it engages—including the sale, leasing and production of aircraft.*

Throughout the proceedings before the Board TWA emphasized that the Board's duty to uphold the public interest alone would require a hearing into the facts of Toolco's misconduct as they affect Toolco's fitness before permitting it to reacquire control of TWA, even if Congress had not—as it has—expressly commanded such a hearing in Section 408 of the Act and in Section 5 of the Administrative Procedure Act [A-18-20 and A-76-80].**

---

* Apart from the allegations of the complaint which stand undenied by reason of Toolco's default, information relating to other abuses of control by Toolco has been developed in the antitrust case. See, *e.g.*, the description of tax manipulations by Hughes and Toolco in connection with aircraft leasing by Toolco to TWA which benefited Toolco and injured TWA as described in Joint Brief for Additional Defendants-Respondents, No. 501 last Term, dated February 18, 1965, pp. 18-21.

** The petition (p. 24) quotes language from the Board's petition for rehearing to the Court of Appeals referring to a staff inquiry into TWA's antitrust claims in connection with the *Toolco-Northeast Control Case, supra.* TWA's answer to this petition for rehearing, which has been filed with this Court as part of the present record [R-479 *et seq.*], corrected the erroneous implication in this language and placed the *Northeast Control* proceeding in its true context. As was there pointed out (pp. 11-22 and Annexes A and B): (1) TWA was not a party to the *Northeast Control* proceeding and had no occasion to present evidence of Toolco's misconduct, (2) the limited inquiry which occurred was expressly stated by the staff to have developed evidence of wrongdoing by Toolco which the staff wished to pursue, but such evidence was for cogent reasons excluded by the examiner and the Board as irrelevant to the urgent question of the survival of Northeast, then before the Board, and finally (3) TWA was expressly advised in writing by the staff almost immediately after this limited inquiry had begun that it would not be pursued solely because of these exclusionary rulings, and that, accordingly, no further evidence would be needed.

The Board's comments in its *amicus curiae* brief, filed last Term in Nos. 443 and 501 (pp. 17-18), do not support Toolco's implication that a full inquiry had been made, and it is obviously significant that no petition for certiorari has been filed on behalf of the Board in the instant case.

In opposing Toolco's motion TWA also called the Board's attention to the Board's own prior statements that Toolco had ceased to control TWA at the end of 1960 and that any resumption of control would require an application under Section 408 of the Act which would be approved only after a searching inquiry [A-16-18], to the Board's reliance in the *Toolco-Northeast Control Case* on the absence of any control by Toolco over TWA [A-17], and to Toolco's repeated statements to the Board and to the courts that it had no control over TWA [A-16-17].

Finally, TWA emphasized that Toolco's reason for attempting to purchase the Series A Notes for over 100 million dollars and thereby acquire control over TWA, was clearly to place itself in a position where it could effectively bar TWA from prosecuting its pending antitrust case against Toolco to a final adjudication [A-10-15, A-75-76]. The damage issues alone present a conflict of interest between TWA and Toolco of the most obvious kind, and of monumental dimensions.

On June 2, 1964 and before the Board had taken any action on Toolco's motion, the Court of Appeals filed its unanimous decision in the antitrust case, 332 F. 2d 602, making it perfectly clear that the claims asserted there against Toolco were within the jurisdiction of the federal courts and would be judicially determined.

The Board's Order

On July 10, 1964, however, with no reference at all to the decision by the Court of Appeals, without further pleadings, without either briefs or oral argument, without any hearing at all into Toolco's fitness, and without any notice in the Federal Register that it intended to dispose of Toolco's application without a hearing, the Board entered an order determining, *inter alia,* that:

(a) Its prior approval of Toolco's original acquisitions of control in 1944 and 1950 extended to the

proposed resumption of control by Toolco even after all power to control had in fact ceased for a period of years. Accordingly, no approval by the Board was required except as to the limited question of the manner in which Toolco proposed to divest itself of simultaneous control over Northeast [A-207-08].

(b) No hearing on the subject of Toolco's fitness to control TWA was now required to be held under the Act, and, since such issues had been considered in the original hearing, no further hearing should be held to avoid *harassment* of Toolco [A-208].

(c) A hearing to consider Toolco's fitness to control TWA, at which its misconduct and anti-trust violations could be considered, together with their grievous effect on TWA, would not "vindicate any statutory objectives" [A-208].

(d) The Board's own statement in Order No. E-16195 that resumption of control over TWA by Toolco would not be permitted without the filing of an application under Section 408, and then only after a searching inquiry, was a dictum not binding upon it which it would therefore disregard [A-208n].

(e) The Board's statements in the *Toolco-Northeast Control* case, including its representations to the Court of Appeals for the District of Columbia which resulted in the affirmance by that court of the Board's order,* that Toolco was not in control of TWA, did not require it to assert jurisdiction except insofar as possible common control over both TWA and Northeast was involved, and were not inconsistent with its determination that control over TWA had never been so relinquished by Toolco as to require further approval by the Board before it could be reacquired [A-205-07].

---

* *National Airlines* v. *Civil Aeronautics Board*, 321 F. 2d 380 (D. C. Cir. 1963).

The Court of Appeals Decision

Ten days later TWA petitioned the Court of Appeals to vacate and set aside the Board's order [R. 246]. On August 4, 1964 that court entered an order granting Toolco's motion to participate in the proceedings as an intervenor. The case was briefed on an expedited basis, and oral argument was heard on September 25, 1964; on December 7, 1964 the Court of Appeals unanimously ruled that Paragraph 2 of the Board's order "is set aside and the case is remanded to the Board for action not inconsistent with this decision" [R. 358] (339 F. 2d at 64). The court's twin grounds were succinctly stated:

> "On the principal issue we hold that the Board should have held a hearing before issuing its order permitting Toolco to resume control of TWA and that the declaratory ruling was an abuse of the Board's discretionary power" [R. 355] (339 F. 2d at 62).

Describing the proceeding under review as an "acquisition of control" proceeding [R. 357] (339 F. 2d at 63), and the Order as "an authoritative pronouncement" [R. 356] (339 F. 2d at 63), "permitting Toolco to resume control of TWA" [R. 355] (339 F. 2d at 62), the court pointed out:

> "Section 408(b) *requires* a hearing to determine whether the acquisition of control of an airline is in the public interest." (Emphasis supplied.) [R. 355] (339 F. 2d at 62)

Since "in view of the default in the antitrust action the charges against Toolco stand undenied" and since these charges "present a picture which is entirely inconsistent with the requirements of the public interest" [R. 355] (339 F. 2d at 62), the court further ruled that, in exercis-

ing any discretion it might have, the Board "could not properly rely on its 1950 order in granting permission to Toolco to resume control of TWA" since it had notice of "changes in the situation during the period since 1950" [R. 356] (339 F. 2d at 63).

Petitions for rehearing were filed both by the Board and by Toolco, and, after TWA had filed an answer, both petitions were denied. Since Toolco had also suggested that its petition for rehearing be heard *in banc,* it was thereupon circulated to all of the active judges of the court in accordance with Rule 25(b) of the Second Circuit's rules. "No active circuit judge having requested that the case be reheard *in banc,* Judge Friendly not participating in the consideration of the petition, the petition [was] denied" [R. 523].

Only the petition of the intervenor Toolco is before this Court since no petition for a writ of certiorari has been filed on behalf of the Board, and the time within which such a petition could have been filed has now expired.

Reasons Why the Writ Should Not Be Granted

The operative portion of Order No. E-21057 reads as follows:

> "2. It is hereby declared that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power to simultaneously control both TWA and Northeast; * * *" [A-209].

The Court of Appeals set aside that paragraph of the Order on the principal ground that, as a matter of law, TWA was entitled to the hearing it had asked for before the Board could make the determination contained therein. Contrary to what Toolco appears to urge, that court

neither substituted its judgment for that of the Board nor assumed any duties or responsibilities entrusted to the Board; it simply ruled that the Board had erred procedurally and remanded the case to the Board for that error to be corrected. In so ruling the Court of Appeals did nothing more than exercise the "exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board * * *" which Congress had granted to it in Section 1006(d) of the Federal Aviation Act.

Its decision dealt with the unique but undisputed facts of this specific case; it ruled only that a hearing must be held when these peculiar facts are present. Review of that decision by this Court is wholly unnecessary.

A. The decision below is plainly correct since Toolco's proposed purchase of the Series A Notes is an acquisition of control of an air carrier by one otherwise engaged in aeronautics within the reach of Section 408(a) of the Act, and a hearing must be held.

B. The decision is also correct on its alternative ground that the Board's refusal to grant the hearing TWA requested was, under the facts present, and in the light of the careful limitations imposed by Section 408(b) of the Act, an abuse of such discretion to deny hearings on disputed matters coming before it as the Board has been accorded by Congress.

C. In any event, this Court should deny review since the impact of the decision below upon the Board's proceedures and air transportation generally is, at most, minimal. (1) The Board's order involved only a narrow legal interpretation of unique facts, unlikely to recur. (2) The arguments sought to be

made by Toolco are wholly remote from the facts of this (or any other) case. (3) Toolco's attack upon TWA's standing to seek review is frivolous.

A. Toolco's Purchase of the Series A Notes Would be an Acquisition of Control

TWA must of course be accorded the hearing it has demanded if Toolco's exercise of its option to acquire the Series A Notes is an acquisition of control within the meaning of Section 408 of the Act.

From the plain words of the statute* and prior interpretations of those and similar words by the Board, other administrative agencies and the courts, it is clear that Toolco's contemplated purchase of the Series A Notes brings it within the reach of Section 408.

The Board's order issued on the premises that Toolco has not been in actual control of TWA since December 1960 [A-207-08] and that it will resume full managerial control of TWA if it is permitted to exercise its option to acquire the Series A Notes and terminate the voting trust [A-208]. In short, and as a practical matter, if Toolco purchases the Series A Notes, it will "acquire control" of TWA in any usual sense of the word.

Early in its existence the Board considered the meaning of the word "control" in Section 408(a). In a series of cases it reviewed the relevant authorities in other fields of

*The language of Section 408(a) of the Act applicable to the instant transaction provides:

"(a) *It shall be unlawful unless approved by order of the Board* as provided in this section—

* * *

"(5) *For* any air carrier or person controlling an air carrier, any other common carrier, or *any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;* * * *." (Emphasis supplied.)

the law, particularly the law affecting public utilities, and concluded that the control to which the statute referred was not a technical matter but was the actual practical power to influence another entity in the conduct of its affairs. See especially *Pan American Airways, Inc., Acquisition of Aeronaves de Mexico,* 4 C.A.B. 494, 496 (1943); *Pan American Airways, Inc., Acquisition of Aerovias de Guatemala,* 4 C.A.B. 403, 404-05 (1943). The Board could have come to no other conclusion in the light of the decision of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145 (1939).

Since the statute refers to *practical* control, and whether that exists is a question of fact to be determined after considering all the evidence, the Board also decided in these early cases that any substantial increase "in the extent or effectiveness of control" constituted a separate acquisition requiring the Board's separate approval under Section 408(a). See *Railroad Control of Northeast Airlines,* 4 C.A.B. 379, 381 (1943). This interpretation of "acquisitions" to include increases in the extent or effectiveness of control has been consistently followed by the Board in later decisions. See, for example, *Pan American-Panagra Agreement,* 8 C.A.B. 50, 56 (1947); *North Atlantic Route Transfer Case,* 11 C.A.B. 676, 682 (1950); *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.,* 9 C.A.B. 381 (1948); *Trans World Airlines, Inc., Further Control by Hughes Tool Company,* 12 C.A.B. 192 (1950).

That the Board's approach in these earlier cases was clearly correct is seen from this Court's holding under the somewhat similar provision of the Interstate Commerce Act that a rearrangement of control through the merger of one subsidiary of Alleghany Corporation into

another was "an acquisition of control" under that Act. *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957). There the Court said:

> "Not labels but the nature of the changed relation is crucial in determining whether a rearrangement within a railroad system constitutes an 'acquisition of control' under §5(2)." 353 U. S. at 166.

The Court's formula for determining whether a proposed transaction was an acquisition of control was stated as follows:

> "Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, * * *." 353 U. S. at 169.

As the Court said, since the subsidiary to be merged would not thereafter exist, it could not reasonably be said that there had been no increase in the power of Alleghany over such subsidiary:

> "While it is not always profitable to analogize 'fact' to 'fiction,' LaFontaine's fable of the crow, the cheese, and the fox demonstrates that there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach." 353 U. S. at 170.

There is a similar "substantial difference" between Toolco's ownership of voting trust certificates for TWA stock and "full managerial control" of TWA which Toolco would acquire by purchasing the Series A Notes.

Toolco misreads the *Alleghany* case when it states that this Court there held that any agency determination as to what constitutes an acquisition of control must be upheld if a rational basis exists for the determination (Petition, p. 14). What the Court in fact said was "* * * the finding of the Commission that a given transaction does or does not constitute a significant increase in the power of one company over another is not to be overruled so long as there is warrant in the record for the judgment of the expert body * * *'" 353 U. S. at 169. In the instant case the Board did not even purport to be making a finding as to the consequent change in Toolco's power over TWA, but viewed any such change as irrelevant to whether or not exercise of the option was subject to the provisions of the statute as to acquisitions of control [A-207-08].

Toolco similarly misreads *Rochester Telephone Corp. v. United States, supra.* There the Court affirmed the finding of the Federal Communications Commission, made only after a full hearing, that a control relationship existed—an issue not presented here—but was careful to point out that the range of issues open to review on appeal from an order of an administrative agency included questions affecting not only the "basic prerequisites of proof" but also "statutory authority". 307 U. S. at 139-40. The issue before the Court in the present case was whether the Board had statutory authority to act without a hearing, at which proof would have been adduced. None of the other cases cited by Toolco at page 14 of its Petition has any relationship to the issues here presented and none of them held that a court should not consider whether an agency had statutory authority to act without a hearing.

While in effect disclaiming jurisdiction over Toolco's reassumption of control of TWA, the Board recognized

the practical change in control which must result from Toolco's acquisition of the Series A Notes and determined that the transaction would have legal consequences which can result only from an acquisition of control within the meaning of Section 408 of the Act. If it had not so decided, at least *sub silentio,* the Board (on its own reasoning) would have had no occasion to deny Toolco's request that it disclaim all jurisdiction over the matter raised. Instead it held that Toolco "could not lawfully resume control of TWA" while in control of Northeast without "prior Board approval under Section 408 after hearing" [A-206]. Such a ruling can be explained only on the basis that a "person" (Toolco) "controlling an air carrier" (Northeast) would otherwise "*acquire control* of [another] air carrier" (TWA) without Board approval.

The Board had not previously passed upon the public interest issues involved in simultaneous control of TWA and Northeast by Toolco for the obvious reason that it had not thought, and had had no reason to think, that Toolco was in control of TWA when it acquired control of Northeast after 1960. By ruling that it must pass on the question of common control (and hold a hearing) unless Toolco divests itself of all control of Northeast before acquiring the Series A Notes, the Board can only have concluded that *acquisition of the Notes would be an acquisition by Toolco of control of TWA.* Identical reasoning compels the Board to pass on the acquisition of control alone (and to hold a hearing thereon), since Toolco, even without Northeast, is otherwise engaged in a phase of aeronautics.

B. The Board's Order Violated the Hearing Requirements of Section 408(b)

To the extent here pertinent, Section 408(b) of the Act reads:

> "Any person seeking approval of a [transaction] * * *, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the [transaction] * * *, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the [transaction] * * * will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such [transaction] * * *, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any [such transaction] * * * which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the [transaction] * * *: *Provided, further,* That, *in any case in which the Board determines that the transaction* which is the subject of the application *does not affect the control of an air carrier* directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, *and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice* of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publica-

tion), *may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.*" (Emphasis supplied.)

There was no dispute that TWA had opposed the entry of the Board's order, requested a hearing and had none. What the Board in effect did by its order was to determine that Section 408(b) of the Act does not require a hearing in any case where the Board decides, as a preliminary matter, that the proposed transaction does not come within Section 408(a). The effect of the Board's conclusion was to claim for itself the broadest kind of discretion to deny hearings, under the very section in which Congress has been most careful to grant only a narrow discretion so to act, explicitly limited even in the very special circumstances defined in the final proviso of Section 408(b) to situations in which no interested party had requested one.*

It is pertinent to observe that, without exception, of the cases cited above on page 17 of this brief dealing with the interpretation of "control" under the Act, all were decided only after a full evidentiary hearing on the facts.

* It is surely significant that both the House and Senate Reports recommending to Congress the adoption in 1960 of the final proviso to Section 408(b) explain the new proviso as intended to create in the Board a strictly limited discretion to act in the absence of a hearing, whereas under the statute as it existed before the amendment a hearing was mandatory in all Section 408 transactions. This new discretion, however, was to be available only in situations which could not possibly affect control of an air carrier. See H.R. Rep. No. 2171, 86th Cong., 2d Sess. (1960); S. Rep. No. 1344, 86th Cong., 2d Sess. (1960). The Board made no attempt to comply with the limitations on its discretion set forth in this proviso. For it to act in a matter of this magnitude without a hearing was so plainly contrary to the desire of Congress as to be a clear abuse of discretion, as the Court of Appeals ruled.

This is as true in those cases in which the Board found that no control existed, so that no Board approval was necessary, as in those cases in which the Board found that control did exist and that it therefore had jurisdiction.

The reason for this practice is obvious. When approval is asked of a transaction possibly involving an acquisition of control, entry of an order disclaiming jurisdiction is just as effective to permit consummation of the transaction as the entry of an order approving it. Consequently, for the Board to grant such a disclaimer of jurisdiction without a hearing in any case where, as here, one having a substantial interest has objected runs directly contrary to the manifest intent of Congress that all questions involving control or possible control should be fully investigated.*

* Even if the Act itself did not specifically require a hearing, the provisions of the Administrative Procedure Act would still have required one to be held. The Board's order was clearly declaratory in nature, and Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004(d), authorizes an administrative agency to issue a declaratory order only in cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing." See *Attorney General's Manual on the Administrative Procedure Act*, p. 59 (1947). Since the Board's only authority to issue a declaratory order must be found in the Administrative Procedure Act—Congress having granted it none in the Federal Aviation Act or other applicable statute—the decision of the Court of Appeals setting aside the Board's order for failure to hold a hearing can be sustained on Administrative Procedure Act grounds as well.

Moreover, denial of a hearing under the circumstances here offends not only the Act but the principles of procedural due process outlined in the *Morgan* cases. *Morgan* v. *United States*, 298 U. S. 468 (1936); *Morgan* v. *United States*, 304 U. S. 1 (1938).

C. The Narrow Issue Tendered by the Petition Does Not Warrant Review by This Court

The basic poverty of the petition's arguments is illustrated by Toolco's recurring compulsion to characterize proper court review of agency action as interference in the administrative process.* The Court of Appeals, for example, is at one point accused of attempting to substitute "predetermined legal principles" for "policies enunciated by the [Board]" (Petition, p. 16).

Stripped of semantic obscurity, Toolco's argument is a bald contention that no court can ever review agency action lest administrative expertise should somehow be derogated; the answer is to be found in this Court's decision in *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 167 (1962):

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *New York* v. *United States,* 342 U. S. 882, 884 (dissenting opinion)." (Footnote omitted.)

---

* A truer perspective of the real issues would result in emphasizing a quite different, but equally basic, principle. When, as here, an agency decision might impair prosecution of a pending antitrust suit, the proper appellate function of a court is, as this Court has stated:

> "* * * to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.,* 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the [administrative agency]." *California* v. *Federal Power Commission,* 369 U. S. 482, 490 (1962).

And even though the expert determinations of administrative agencies are entitled to great weight, the courts still retain their critically important function of judicial review. As this Court said in rejecting an administrative interpretation of controlling statutory language in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368-69 (1946):

> "The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both [*Labor Board* v. *Hearst Publications*, 322 U. S. 111, 131, and *Gray* v. *Powell*, 314 U. S. 402, 411], advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." (Footnote omitted.)

The only question involved in this case is whether TWA —on the facts present—was entitled to a hearing as a matter of law; review of that narrow issue by this Court is not necessary since (1) the decision below determined merely that the Board's legal theory is incorrect as applied to such facts; (2) Toolco's petition ignores this sole issue to concentrate instead on a host of irrelevancies, unconnected with this case; and (3) TWA's standing to object to the treatment accorded it by the Board is plain.

(1) *The Board's Legal Theory.* The Court of Appeals in this instance did not review any exercise of expertise by the Board; it simply reviewed a Board ruling as to the legal effect of certain prior Board orders on TWA's right

to a hearing, concluded that the Board had decided that legal issue wrongly, and remanded to the Board in order that the Board might thereafter consider the public interest questions raised by Toolco's application which it had not considered before.

The Board had asked and answered the wrong question when it sought to determine whether its December 1960 order (No. E-16195) operated to terminate or vacate its 1944 and 1950 orders approving previous acquisitions of control by Toolco and concluded that the order did not have that effect. It does not matter whether Board orders approving prior acquisitions have terminated or will ever terminate, either by their own terms or by formal Board action, since in any event those approvals could extend only to the particular acquisitions of control to which they related.

Section 408 is addressed not to the continuing state of *being in* control, but to specific transactions constituting *acquisitions* of control.* When a person not actually in control of an air carrier purchases securities which carry with them the legal right to exercise voting control over that carrier, that transaction has a specific, separable, readily identifiable effect, which, in the plain language of the statute, can only be described as an acquisition of control. Heretofore, the Board has expressly rejected the contention that its approval of a specific acquisition of control confers some kind of perpetual *carte blanche* on the acquirer; in 1948, referring to a similar Toolco conten-

* As the Board itself stated in its *amicus curiae* brief in Nos. 443 and 501, last Term:

> "Section 408 requires the Board to approve only an 'acquisition of control'; it does not give the Board continuing responsibility for supervision of a controlling person's management of an air carrier." (p. 12)

tion as to the effect of its original 1944 order in this case, the Board said:

> "Indeed, it would be unreasonable to assume that our approval then of Toolco's 45-percent stock interest in TWA would forever constitute an unlimited ratification of any and all future acquisitions of ownership interest in the carrier." 9 C.A.B. at 389 [A-115].

The Board's failure to understand the true situation before it is indicated by its choice of the phrase "temporary hiatus in control" which suggests that it regarded Toolco's proposal as involving a pre-existing control which was to spring up again, after a temporary somnolence, upon the happening of certain extraordinary events not themselves subject to the Board's approval. But Toolco would not be the passive recipient of voting control automatically devolving upon it, for what it proposes is a major financial transaction initiated by itself, which will cost it more than $100,000,000 and involves the purchase of securities never before owned by it and which it has no obligation to purchase. The admitted purpose and intent of the proposed transaction is to acquire the power to vote 78% of TWA's stock, a power which it could not otherwise acquire before 1970 when the voting trust will expire.*

---

* Nor is it material that the voting trust through which Toolco's surrender of control was effected had a life expectancy of ten years. The Board has held that an acquisition of control limited to a short period of time is within Section 408. *Transocean-Atlas Case, Control and Interlocking Relationships,* 29 C.A.B. 622, 624 (1959): "* * * a control relationship exists as long as either the power to dominate or actual domination is present." Even were Toolco's right to reacquire control of TWA when the term of the voting trust expires in all respects indefeasible (contrary to the Board's 1960 ruling), the proposed reacquisition of control before the scheduled termination of the voting trust in 1970 is a separate acquisition of control for the period prior to 1970, and Board approval after hearing is still necessary.

Finally, and apart from whether it rested upon a tenable legal theory, the Board's ruling was concededly narrow in scope; it was made "in view of the importance of * * * removing uncertainty as to the application of section 408 to the peculiar facts involved * * *" [A-207] and purported to deal with nothing beyond "the unique circumstances present here" [A-208]. Nothing in the order indicates that the Board had any thought at the time that it was laying down standards to govern any case broader than that before it.* In view of the narrowness of the Board's order, Toolco's apparent contention that the Court of Appeals was required not only to pass upon the case before it but also lay down guidelines for other and different cases (Petition, p. 18) is nonsense. To have done so would have been the very sort of interference in Board affairs at which Toolco has elsewhere in its petition inveighed.

That no petition has been filed on behalf of the Board hardly supports Toolco's alleged concern that the decision below will seriously handicap the Board in the future exercise of its administrative and supervisory functions.

(2) *Toolco's Arguments.* Most of the arguments urged in the petition relate only tangentially, if at all, either to

* The congeries of horrors which Toolco contends will result from the court's decision are premised either upon misconstruction of what the court in fact did or upon unsupportable generalizations to other entirely different cases. To take a single example, the financing of air carriers can hardly be widely inhibited by a decision that a one-time controlling person subject to Section 408 of the Act, who has completely surrendered control of an air carrier and against whom most serious charges of malfeasance toward that carrier stand undenied, should be subjected to a hearing into fitness before being permitted to reacquire control of the air carrier—especially where the air carrier is then demanding such a hearing. Yet this is all the Court of Appeals held.

the decision of the Board or to that of the Court of Appeals reversing it. Toolco apparently refuses to recognize that the court's sole determination was that, in this case, the Board should have held a hearing.

For example, the Court of Appeals never decided "when and under what circumstances a given relationship should be permitted between a person engaged in a phase of aeronautics and an air carrier" (Petition, p. 16), and indeed could not have so decided since the Board had not considered Toolco's fitness to control TWA at all but—quite the contrary—had determined that Toolco had the legal right in any event to reacquire control under the circumstances present. Toolco's talk of the "regulatory scheme of the Act", though reminiscent of its arguments in Nos. 443 and 501, last Term, is meaningless.

Nor did the court ever decide "when and under what circumstances" Board orders approving an acquisition of control might be terminated (Petition, p. 19) since the only question before the court was whether the orders in question had the legal effect upon TWA's right to a hearing which the Board had ascribed to them.

Toolco's statement that the court, by remanding for a hearing into Toolco's fitness to acquire control of TWA, "imposed upon the CAB its view that it is more consistent with the public interest for the lending institutions to continue in control of TWA, even if that control is in violation of the Act, than for Toolco to assume exercise of the control which the CAB approved" (Petition, p. 20) is a plain absurdity. It is, however, an absurdity which exemplifies Toolco's habitual reliance upon various "non-facts" without any record basis. Regardless of what merit there may be to Toolco's charges against the lending institutions (and Toolco's choice to default in pros-

ecuting its charges reveals its true opinion of their merit), certainly the Board's order did not reflect its judgment that Toolco, in preference to TWA's present management, should direct TWA.

The same references to "non-facts" underlie Toolco's curious argument that TWA's minority stockholders would be better off in some undefined way if Toolco could but regain control of TWA before the damage hearings (in which TWA seeks some $150,000,000 from Toolco) can be held; for Toolco to refer to "conflicts of interest" in this context, as it does (Petition, p. 22), is incredible.

More *Alice in Wonderland* reasoning can be seen in its claim that the Court of Appeals, by remanding to the Board for a hearing, has deprived it of its "contractual right to exercise control over TWA" without affording it "any hearing whatsoever" (Petition, p. 21)—as if it were Toolco which had demanded a hearing and been refused it. Similarly, it asserts that the charges in TWA's antitrust complaint "have never been the subject of a hearing on the merits" (Petition, p. 24) even though it was Toolco's own decision to default rather than let the truth come out which has foreclosed it from any further hearing except as to the amount of damages it must pay TWA.

As for Toolco's contention that TWA had available to it other forms of administrative relief against Toolco, that would be wholly beside the point even if true. TWA was entitled to the hearing it demanded and the Act provides before Toolco should acquire control over it. The court held, as TWA had urged, that exercise by Toolco of its option to acquire the Series A Notes amounted to an acquisition of control as a matter of law, and a hearing into Toolco's fitness was thus required by Section

408; alternatively, the court concluded that the Board had abused its discretion when, over TWA's objection and with knowledge of the serious charges in the antitrust case, it ignored the clear intent of Congress set out in Section 408 that no proceeding under that Section affecting control should be determined without a hearing when a person disclosing a substantial interest is then demanding one.

(3) *TWA's Standing to Sue.* Toolco's final contention —that TWA is not a person "disclosing a substantial interest" in the Board's order—is frivolous.

What Toolco overlooks is that the proceeding from which the relevant order resulted was a proceeding under Section 408. The Board was not interpreting contract rights. Even on its own theory the Board was concerned with orders issued in an earlier Section 408 proceeding as to which TWA would have had clear standing simply as a party to the proceeding in the course of which those orders were formulated.

In any case, as the Court of Appeals observed, the standing requirement of Section 1006(a) is liberal, and, clearly,

> "• • • TWA as the 'victim' in this 'acquisition of control' proceeding • • • possesses standing under Section 1006(a)" [R. 357] (339 F. 2d at 63).

Conclusion

The petition should be denied.

Respectfully submitted,

JOHN F. SONNETT,
80 Pine Street,
New York, New York 10005
Attorney for Respondent,
Trans World Airlines, Inc.

CARL S. ROWE,
25 Broadway,
New York, New York 10004
Attorney for Respondent,
Trans World Airlines, Inc.

Of Counsel:
DUDLEY B. TENNEY,
MARSHALL H. COX, JR.,
ABRAHAM P. ORDOVER,
80 Pine Street,
New York, New York 10005.

July 2, 1965.